

The very next month, on May 9, 2024, the Society Advocates Guild hosted a symposium at the Wayne State University Law School on the 1981 decision in *Poletown Neighborhood Council v Detroit* (410 Mich 616) and the 2004 decision in *County of Wayne v Hathcock* (471 Mich 445).

Eminent Domain, *Poletown*, and *Wayne v. Hathcock*

The presenting panel was comprised of former Justice James Ryan, author of a dissent in *Poletown*; Mary Massaron and Alan T. Ackerman, who represented the defendants in the *Hathcock* case; and former Justice Robert P. Young, Jr., who wrote the opinion in *Hathcock*. The entire event was emceed by Justice Brian K. Zahra

Justice Ryan, who turns 92 this year, reminisced on the *Poletown* case and his dissent. He remarked that the case was argued and decided so quickly – 10 days! – that his dissent was filed more than a month after the opinion was published. His dissent begins with “This is an extraordinary case. The reverberating clang of its economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations;” he was right, the *Poletown* opinion controlled Michigan law and was highly influential around the country. More than twenty years later, *Hathcock* was argued before a completely different Court.

Alan Ackerman then provided a remarkable summary of the “factors that created an environment supporting the *Poletown* claims, the response to *Poletown*, and what has occurred since.” His remarks are published in full on the following page.

Mary Massaron, who chairs the Advocates Guild, noted that Justice Ryan’s dissent provided an excellent argument for the property owners. She recalled the argument before the Court and the approach that she and Alan Ackerman agreed on for presenting the property owners’ position urging a reversal of *Poletown*.

Finally, Justice Young gave the audience a constitutional lecture on the right to private property, remarking that (1) words matter when defining public use and benefit vs. public use alone; and (2) with no disrespect to his predecessors and Justice Ryan’s colleagues, but the “majority opinion [in *Poletown*] was intellectually flaccid.”

After the panelists spoke, questions were taken from the audience, which included SBM Executive Director and Society Board Member Peter Cunningham, Society President Emeritus Carl Herstein and his wife, Butzel Attorney Barrett Young, former county prosecutor (and legal legend) Tim Baughman, Retired Judge Giovan, Wayne County Judge Terrance Keith, Society Board Member John Fedynsky, and Advocates Guild Member Eric Restuccia.





Advocates Guild Chair Mary Massaron and Retired Justice
(and Federal Court of Appeals Judge) James Ryan



Alan T. Ackerman has been a practicing
lawyer since 1972.



Mary Massaron has been a lawyer since 1990 and in-
volved in the Advocates Guild since its creation.



Former Justice Young served on the Court from 1998 to
2017, and was Chief Justice from 2011 to 2016.

Defendants argue that this exercise of the power of eminent domain is neither authorized by statute nor permitted under article 10 of the 1963 Michigan Constitution, which requires that any condemnation of private property advance a “public use.” Both the Wayne Circuit Court and the Court of Appeals rejected these arguments -- compelled, in no small measure, by this Court’s opinion in *Poletown Neighborhood Council v Detroit*.

Wayne Co. v Hathcock, 471 Mich 445 (Mich 2004)



Alan T. Ackerman offered the following remarks:

I will discuss the factors that created an environment supporting the *Poletown* claims, the response to *Poletown*, and what has occurred since the 1980 act, *Hathcock*, and the 2006 Constitutional Amendment.

All institutional and political decision-makers found that the Michigan industry was failing even before the 1974 oil embargo. The demographics and our never-ending industrial revolutions have created less demand for industrial employment. In 1974, legislation establishing local ‘development’ boards was enacted. The Economic Development Act provisions allowed the planning and acquisition by eminent domain. (MCL 125.1601)

Detroit’s auto industry experienced tumultuous times in the 1970s. The *Poletown* majority reviewed the employment losses and dire circumstances of Detroit.

What has not been frequently discussed was the confluence of several other factors.

Dodge Main, a 67-acre complex built on the Hamtramck side of the city border, was the Chrysler plant built as the Ford Rouge facility’s competitor. Over 35,000 were employed at the plant through the early 70s. The Dodge Revolutionary Union Movement (“DRUM”) had crippled activities at the plant. Simply put, Chrysler wanted to expand in Detroit in the North Industrial Project and get out of the Dodge Main employment and plant is-

sues. Between the DRUM activities and the age of the Dodge Main plant, Chrysler wanted ‘out’ and planned to close in 1980.

In the 1970s, Judge Keith entered a significant damage award against Hamtramck for the city’s racial discrimination in having I75 moved through the African American portion of the city. The sizeable financial penalty exacerbated Hamtramck’s problems.

Another factor precipitating the *Poletown* process, but not frequently discussed, was DeLorean Auto’s failure to construct a Detroit plant. In the mid-70s, John DeLorean wanted to build a plant in what is now the Connor Creek area, east of Detroit’s large water plant on the South side of Jefferson. This is where the condemnation issue enters the *Poletown* story.

Under the 1908 Michigan Constitution, over thirty eminent domain statutes authorizing eminent domain existed. There were slow takes, quick takes, and cases in Probate, Circuit, and tribunals, all dependent on the statutory delegation. The process allowed for what was called slow takes. Some statutes allowed the condemning authority to walk out of the case if the verdict was too high but allowed transfer of possession only after the final judgment and when an appeal was made so that the acquisition could take years. The certainty that the property acquisition would take so long terminated the hope of the DeLorean Motor Car Company borrowing our money by building a Detroit plant! It was one of the few good breaks for Detroit in the 70s.

At the same time, everyone was dissatisfied with the plethora of condemnation provisions. The utilities were upset with a process in which lawyers were paid to bring challenges for non existing reasons. Governmental agencies could not move with the slow-take procedure. Lawyers could not deal with the multitude of provisions allowing court and judge picking. The DOT was provided a quick take, but only for nonresidential property.

For twelve years, Jason Honigman, as leader of the then all-powerful Michigan Judicature Commission, and Bert Burgoyne, as Michigan Bar Condemnation Committee Chair, would attend a session where each offered a proposal of what each thought the law should be. Mr. Honigman sought uniformity in each act, which the General Court Rules to apply to all provisions. Mr.

Burgoyne sought uniformity in the acts, with one process that would apply to all acquisitions.

After all those years, in 1979, the three of us agreed that we should include both goals in one draft. The new act allowed a quick take for all properties, ending the logjam that had required slow takes for nonresidential property.

At the time, neither Mr. Burgoyne nor I knew that GM had shown interest in what is now described as the Poletown square mile. The land consisted of about 600 acres, including over 100 of Hamtramck and Dodge-Main, and was then in the process of closure. In addition, the discrimination award against Hamtramck was being paid via federal grant funding. However, the changes to Act 87, allowing a quick take or relatively immediate possession of urban residential property, was an earthquake change of the Michigan eminent domain statutory framework. With Poletown purely economic development reasons, it would be enough to obtain private property from all citizens.

What is too rarely discussed is Justice Fitzgerald's relatively short but precise challenge to the mislaid constitutional premise that the Constitution validly contemplates the taking of private property for the benefit of a designated user. Justice Fitzgerald noted Cooley's comments that "the question of public use is always one of law. Deference will be paid to the legislative judgment, expressed in enactments providing for an appropriation of property, but it will not be conclusive" is to remain as our standard.

In the then-existing blight clearance cases, the jury was required to determine whether the area was blighted, negating the objection that the property was being turned over to a private party.

Justice Fitzgerald distinguished the few commercial redevelopment projects of other states that allowed acquisition for industrial development, noting that the government, not the private end user, chose the location for industrial development.

This is distinct from taxes, where no sole burden is singly divested of property, and others will not be potentially affected.

Finally, Justice Fitzgerald posited that the notion that

public use is evolving destroys the concept of private property. The problem with *Poletown* was that the public purpose was fulfilled only after the transfer to GM. This was not for the eradication of blight.

In the respected *pod Poletown*, Justice Young noted the speed of the trial process, the expedited appeal process, and the immediacy of the Michigan Supreme Court decision. Justice Ryan filed a lengthy and reasoned opinion after the March 1981 decision. Justice Ryan's concurring opinion served as a clarion call for a return to the constitutional limitations contemplated by the 1963 Constitution.

You will hear about the ramifications of the decision in the next hour. Acknowledging *Hathcock* existed but concerned that it may be reversed in the future, the 2006 constitutional amendment ratified and reinforced the *Hathcock* decision. In addition, the amendment changes the burden of proving the public use from the owner to the authority by a preponderance of evidence standard and clear and convincing evidence in blight takings.



Justice Brian K. Zahra introduced each speaker and provided the microphone to audience members with questions.

Retired Chief Justice Robert P. Young and author of the *Hathcock* opinion offered the following comments:

In the early 1980s, Detroit was hemorrhaging jobs; the auto industry was under siege by the success of foreign imports, and joblessness was running 18% in Detroit.

Detroit Mayor Coleman Young persuaded GM to build a new modern plant on the site of the then-defunct Chrysler Dodge Main plant, supplemented by additional surrounding property in a community known as Poletown that had been the center of Detroit's Polish community for a century.

The additional Poletown properties necessary for the new GM plant were to be acquired by condemnation, justified as a "public necessity," to "alleviate unemployment," and because the benefit to the public was primary and the benefit to GM was "incidental."

Unquestionably, the creation of new jobs was a major economic benefit to Detroit. However, whether the benefit to GM could be characterized as "incidental" is questionable.

GM paid Detroit a minimal amount for the new plant project. The development costs borne by Detroit was a fifth of a billion dollars and GM was granted 12 years of tax abatement. When the GM plant project was announced and the condemnation of Poletown became apparent, the residents of Poletown objected and eventually sued to prevent the taking of their homes and businesses.

The case eventually came to the Michigan Supreme Court that decided the case in just 10 days.

Poletown permitted government takings for a public benefit – where it advances "industry and commerce" – not a public use as required by our constitution.

The issue in *Hathcock* was whether Wayne County was constitutionally authorized to take private property of landowners around the Detroit Metropolitan Airport in suburban Wayne County to advance economic development of this area. The Wayne County Pinnacle Project, as it was called, proposed to condemn the property of landholders around the airport and sell it to developers to create an "enterprise zone" of new businesses. Wayne

County argued in *Hathcock* that its challenged takings to advance development of the area surrounding Detroit Metro Airport promoted the growth of "industry and commerce" and were supported by the Poletown decision. The property owners argued that the taking of their property was not for a "public use," the only kind of government takings the 1963 constitution permitted.

Hathcock held that a person's property cannot be taken by the government and given to another private person, no matter how much "industry and commerce" might be advanced by the taking, and overruled *Poletown*.

Hathcock examined the Court's previous takings decisions and held that "the transfer of condemned property to a private entity....would be appropriate in one of three contexts":

- (1) Where "public necessity of the extreme sort" requires collective action (e.g., highways and railroads);
- (2) Where the property remains subject to public oversight after transfer to a private entity (e.g., regulated pipelines); and
- (3) Where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred (e.g., slum clearance to promote public health).

Shortly after *Hathcock* was decided, the citizens of Michigan enacted an amendment by referendum ratifying the *Hathcock* construction of the takings clause and explicitly removed the ability of the government in Michigan to take one person's property to give another in service of a "public purpose."

The amendment, ratified in 2006, provides that

"Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.

The people of Michigan decisively decided the question, favoring *Hathcock*.